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No. 95-3595

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, HOWARD MCDOUGALL, *et al.*,
Petitioners,

v.

PATHOLOGY LABORATORIES OF ARKANSAS, P.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

For several years, an ERISA health and welfare fund paid a medical group's charges for clinical pathology services provided to fund participants. The fund then stopped paying for these services and sought restitution from the medical group of the amounts previously paid. The questions presented are:

1. Whether the court of appeals properly upheld the district court's factual determination that the fund had not made a mistake of fact which would entitle it to restitution.

2. Whether the court of appeals properly interpreted the fund's governing documents as barring the fund from retroactively recovering payments that the fund had deemed proper at the time of payment.

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Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA") 4

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pathology Laboratories of Arkansas, P.A. ("Pathology Laboratories") respectfully requests that this Court deny the petition for a writ of certiorari filed by Central States Southeast and Southwest Areas Health and Welfare Fund ("Central States") seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit.[1]

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[1] Pursuant to Rule 29.6 of this Court, Pathology Laboratories of Arkansas, P.A. discloses that it has no parent or subsidiary companies.

STATEMENT OF THE CASE

This case involves a payment dispute between an ERISA health and welfare fund and Pathology Laboratories, a medical group of pathologists. For approximately five years, the fund—petitioner Central States—paid Pathology Laboratories for clinical pathology services provided to Central States participants. Later, Central States stopped paying for these services and filed this suit seeking recovery of the amounts that it had previously paid. Central States' sole theory of recovery was that it was entitled to restitution because it had paid pursuant to a mistake of fact.

At the conclusion of a bench trial, the district court held that Central States had not made a mistake of fact and that it therefore was not entitled to restitution. In affirming, the court of appeals specifically upheld the district court's factual finding that Central States had paid knowingly, rather than pursuant to a mistake of fact. Pet. App. 7a. The court of appeals also rejected Central States' argument that the Plan Document allowed Central States to retroactively recover payments that Central States had deemed proper at the time of payment. *Id.* at 7a-8a.

1. Pathology Laboratories is a group of eight pathologists (the "Pathologists") who perform services for patients at the Baptist Medical Systems Hospitals (the "Hospital") in Little Rock, Arkansas. The Pathologists are physicians who specialize in applying medical knowledge and judgment to the testing of biologic specimens and to the analysis of such testing. The Pathologists perform several types of professional services in the laboratory, including clinical pathology services. Clinical pathology involves the examination and testing of bodily fluids.

When a test is performed for a patient at the Hospital, two bills are generated: one from the Hospital and one from Pathology Laboratories. *Id.* at 1a. The Hospital's

bill (the "technical component") covers equipment, supplies, and salaries of laboratory technicians. Pathology Laboratories' bill (the "professional component") covers the professional services of the Pathologists. These services include "setting up test protocols, calibrating the equipment and supervising the testing, and, if necessary, interpreting the results and consulting with treating physicians." *Id.* at 2a. The Pathologists are available 24 hours a day, seven days a week, to consult with laboratory technicians or treating physicians concerning test results. *Id.*

Pathology Laboratories bills the same amount for a particular laboratory procedure, regardless of whether the procedure required a Pathologist to personally review or examine the patient's specimen or test result. Generally, the professional component charges submitted by Pathology Laboratories amount to no more than $2 to $5 per test. *Id.* Pathology Laboratories does not submit any additional charge when its Pathologists "intervene to ensure that a test is done right, to recheck a surprising result, or to interpret ambiguous data." *Id.* In this way, the professional component "spreads costs across all patients—and in the process avoids the need to keep records about just which test required just which services." *Id.*

Central States' participants regularly receive services at the Hospital. Upon admission to the Hospital, participants sign an agreement providing (1) for the assignment of their health benefits to the Hospital and to Pathology Laboratories, and (2) for the participant's personal financial responsibility for all charges. *Id.* at 4a, 15a. Prior to November 1991, Central States routinely paid Pathology Laboratories' bills for clinical pathology services. In November 1991, however, Central States informed Pathology Laboratories for the first time that it would no longer pay Pathology Laboratories' charges for clinical pathology. Central States staff took the position that its Plan Document did not cover professional component charges unless a Pathologist had personally reviewed or

examined the test result. This position was later reviewed and upheld by the trustees of the plan. *Id.* at 23a.

In June 1992, Central States filed its complaint in this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). The complaint sought (1) a declaration that the Pathologists' charges were not covered under the Plan Document of Central States; (2) an injunction prohibiting Pathology Laboratories from billing participants for charges that Central States refused to pay; and (3) restitution of charges paid to Pathology Laboratories from January 1986 until November 1991. Pet. App. 3a.

2. In the district court, the case was originally assigned to Judge Brian Barnett Duff. On June 30, 1994, Judge Duff entered an order granting summary judgment for Central States on the issue of coverage under the Plan Document. *Id.* at 18a. Based on the standard set forth in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), Judge Duff held that the trustees of Central States had not been arbitrary and capricious in determining that the Plan Document did not cover Pathology Laboratories' professional component charges. Pet. App. 37a. He also held that the participants' agreement to bear financial responsibility for Pathology Laboratories' bills was "preempted by ERISA" and that Central States therefore had standing to seek an injunction against billing of its participants by Pathology Laboratories. *Id.* at 34a. Although Judge Duff found that Central States had standing to seek an injunction and restitution, he did not rule on the merits of those issues. *Id.* at 35a-36a. Instead, he directed the parties to submit supplemental briefs.

The case was then transferred to United States District Judge Elaine E. Bucklo. On February 21, 1995, Judge Bucklo entered an order reversing Judge Duff's finding of ERISA preemption and granting summary judgment in favor of Pathology Laboratories on Central

States' injunction claim. *Id.* at 14a. Judge Bucklo reasoned that Central States' decision not to pay Pathology Laboratories for the professional component "does not . . . prohibit a participant from contracting with the physician for services." *Id.* at 15a. She concluded that ERISA does not preempt a contract between a health care provider and a patient "for services rendered." *Id.* With respect to the restitution claim, the order denied both parties' motions for summary judgment and set the case for trial.

On April 17, 1995, Judge Bucklo held a one-day bench trial on the issue of restitution. Central States' only witness at trial was Brian Murtha, a manager at Central States. He testified that Central States had paid the Pathologists' charges from 1986 to 1991 under the mistaken belief that each charge represented a direct "hands-on" review by the Pathologist of a particular patient specimen or slide. *Id.* at 12a. Pathology Laboratories presented three witnesses, including Robert Benafield, M.D., Medical Director of Blue Cross Blue Shield of Arkansas from 1973 to 1992. Dr. Benafield testified that the Pathologists' bills were consistent with generally accepted billing practices for pathology and that a reasonable insurer would have understood that charges of $2 to $5 did not represent personal review or examination by a Pathologist of each patient specimen. *Id.* at 11a.

At the conclusion of the trial, Judge Bucklo denied Central States' claim for restitution. She specifically found that, in paying Pathology Laboratories' bills for over five years, Central States had not made a mistake of fact. *Id.* at 12a. In this regard, Judge Bucklo found that she "simply could not credit . . . testimony" of Central States' sole witness, Brian Murtha. *Id.* Instead, Judge Bucklo relied on the testimony of Dr. Benafield. *Id.* at 11a. She found no evidence of bad faith on the part of Pathology Laboratories. *Id.* at 12a. Accordingly,

Judge Bucklo entered final judgment in favor of Pathology Laboratories and against Central States. Resp. App. 1a. Central States appealed to the Seventh Circuit.[2]

3. The Seventh Circuit affirmed the final judgment entered by Judge Bucklo. With respect to the injunction issue, the court of appeals rejected Central States' argument that the Pathologists "do not render medical services to the Hospitals' patients." Pet. App. 4a. To the contrary, the court of appeals found, "Pathology Laboratories provides supervisory services of value to all patients, and interpretation services of value to some." *Id.* While Central States could deny coverage for particular services, nothing in ERISA allowed it to prevent the Pathologists from billing patients for the services that Central States refused to cover. *Id.* In particular, the court held that ERISA did not preempt Pathology Laboratories' contractual right to collect from patients who were covered by the Central States plan. *Id.* at 5a.

The court of appeals also held that Central States could not obtain restitution of the amounts that it had paid to Pathology Laboratories prior to its November 1991 decision to deny payments. In particular, the court upheld the trial court's factual determination that Central States had not made a mistake of fact regarding the nature of the Pathologists' services. *Id.* at 7a (citing *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985)). The court noted that, years prior to Central States' decision to stop payments, Pathology Laboratories had advised Central States "exactly and for what services the firm billed." *Id.* at 7a. Central States' own consultant "conveyed the same infor-

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[2] The final judgment entered by Judge Bucklo addresses the issues of restitution and injunction only, and indicates that judgment is "in favor of the defendant and against the plaintiffs." Resp. App. 1a. The final judgment does not address the subject matter of Judge Duff's interlocutory ruling concerning the scope of coverage under the Plan Document. By the time of trial, Pathology Laboratories no longer pursued the coverage issue and Judge Bucklo did not find it necessary to address it. Pet. App. 3a.

mation, yet the Fund continued to pay." *Id.* In addition, the court of appeals upheld the trial court's determination that the testimony of Central States' sole witness—who said that he misunderstood the bills submitted by Pathology Laboratories—was not credible. *Id.*

Because the Pathologists had provided valuable services for Central States participants, the court of appeals found that Pathology Laboratories had not been unjustly enriched. "A provider of medical care is not unjustly enriched by being paid the market fee for its services," the court found. *Id.* at 6a. Further, the court noted, restitution would leave Pathology Laboratories "without compensation for five years of services to the Fund's participants." *Id.*

Finally, the court of appeals rejected an argument that Central States made "[a]lmost in passing." *Id.* at 7a. Specifically, Central States noted that Article 11.04 of its Plan Document permitted it to recover "excess payments" made to any person or entity. *Id.* Central States maintained that Article 11.04 should be read broadly to encourage prompt payment of claims. While granting "the advantages of speedy payment," the court of appeals found that:

> Article 11.04 does not call for retroactivity, which would violate another important policy: 'preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting), quoted with approval in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).

Id. at 8a. Instead, the court interpreted Article 11.04 as addressed to situations where a mistaken payment is made —for example, an extra zero is added to a check. *Id.* Because Central States paid Pathology Laboratories knowingly, rather than pursuant to a mistake, the payments were not "excess payments" within the meaning of

Article 11.04. The court concluded that the district court had properly allowed Pathology Laboratories to keep the payments it had received for the professional component.

REASONS FOR DENYING THE WRIT

Central States' petition should be denied for at least three reasons. First, the petition raises an issue that was not presented in the courts below. Second, the court of appeals' decision turns on a case-specific factual question and presents no issues of national importance. Finally, the decision below does not conflict with any decision of another court of appeals or of this Court.

1. The petition filed by Central States raises an issue that was not litigated or addressed in the courts below. Specifically, Central States seeks certiorari as to whether the written terms of an ERISA plan:

> may be modified by means of either oral representations or by conduct inconsistent with the terms of the plan.

Petition at i. Central States never briefed or argued this issue in the district court or the court of appeals. Accordingly, even if this Court were to deem the issue worthy of review in an appropriate case, this is not such a case. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.").

Central States' petition takes as its point of departure the last paragraph of the court of appeals' opinion. In that paragraph, the court of appeals rejected Central States' argument—made "[a]lmost in passing," Pet. App. 7a—that the "excess payments" clause of Article 11.04 permitted Central States to retroactively recover past payments. Contrary to the petition, the court of appeals did not hold that Central States' conduct in paying the pathology charges for five years somehow "modified" the

terms of the Plan Document. See Petition at i, 8-10, 14-15.

Far from *overriding* the terms of the Plan Document, the court of appeals' decision *gave effect* to those terms. Specifically, the court of appeals interpreted Article 11.04 as permitting recovery of past payments only if those payments were in "excess" at the time they were made. Pet. App. 8a. Because the court found that Central States made the payments knowingly rather than by mistake, it concluded that the payments were not "excess payments" within the meaning of Article 11.04.[3] Nothing in the court of appeals' opinion holds that the Central States plan could be "modified" by a course of conduct.

2. The decision below rests squarely on a case-specific factual question: Did Central States make a mistake of fact in paying Pathology Laboratories for its services over a five-year period? The lower courts' finding that Central States did not make the payments by mistake is correct and, in any event, does not warrant review by this Court. *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 178 (1938).

Central States makes much of Judge Duff's finding that the Plan Document was "unambiguous" in excluding coverage for the Pathologists' services. See Petition at 10, 13-15. In particular, Central States reasons that it *could not* have changed its interpretation of a Plan Document that was "unambiguous," and that the court of appeals therefore *must have* found that Central States "modified" the Plan Document through its course of conduct. *Id.* at 12-14. This argument mischaracterizes the record and cannot be reconciled with the factual findings of the trial court. Whether or not the Plan Document was "unam-

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[3] The court explained: "The district court found that the Fund knew all along what the bills represented and in November 1991 changed its view of how such bills should be handled. A change in interpretation makes it hard to call earlier payments 'excess.'" Pet. App. 8a.

biguous," the trial court found—after hearing the witnesses and evaluating their testimony—that Central States made a knowing decision to pay the Pathologists' charges and then later changed its interpretation of the plan. Pet. App. 11a-13a. The court of appeals, citing *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), upheld these findings as not clearly erroneous. Pet. App. 7a.

Central States asserts that it is not challenging the finding that it did not make the payments by mistake. Petition at 8, 12 n.3. That finding, however, provides the essential underpinning of the decision below—including the holding with respect to Article 11.04. As the court of appeals held, a "change in interpretation makes it hard to call earlier payments 'excess' " within the meaning of Article 11.04. Pet. App. 8a. Unless Central States can provide a basis for overturning the finding that it made no mistaken payments, it has no grounds for reversing the judgment. In any event, the issue of the proper interpretation of Article 11.04 has no importance beyond this case and does not merit review by this Court.[4]

3. Central States maintains that the decision below was improperly based on principles of "estoppel" and that it therefore conflicts with decisions of other courts of appeals and of this Court. See, *e.g.*, Petition at 9 ("the Seventh Circuit professed to be using estoppel princi-

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[4] Central States appears to find great significance in the fact that Pathology Laboratories did not cross-appeal from Judge Duff's finding that the Plan Document was "unambiguous." Petition at 6, 10, 13-14. This argument is specious. An interlocutory ruling (much less *dicta*) from a district court is not binding on a court of appeals reviewing a final judgment. Indeed, portions of Judge Duff's ruling were rejected by Judge Bucklo even before the case came to the court of appeals. Pet. App. 15a. And no portion of Judge Duff's ruling was incorporated into the terms of the final judgment. *See supra* p. 6, n.2; Resp. App. 1a. Cross-appeal or no, the court of appeals had every right and authority to uphold the trial court's factual determination that Central States had not made a mistaken payment.

ples"), 10 ("The Seventh Circuit's application of common law principles of estoppel to overturn the terms of an ERISA plan conflicts not only with holdings in the other circuits, but also with prior decisions by this Court"), & 14 ("In this case the Seventh Circuit stated that it was using principles of estoppel . . ."). The remarkable truth, however, is that the term "estoppel" appears nowhere in the Seventh Circuit's opinion. Contrary to the petition, the appeal in this case simply did not present any estoppel question.

a. To be sure, the court of appeals did indicate that the Pathologists had "relied to their detriment" on the unbroken pattern of payments from Central States over a five-year period. Pet. App. 8a. But this *dictum* does not hold—or even suggest—that the terms of the Plan Document can be "modified" by oral representations or conduct. Quite to the contrary, it simply supports the court's conclusion that an interpretation of Article 11.04 which permits retroactivity would be unreasonable. In essence, the court found that, to be an "excess payment" under the Plan Document, a payment must be excessive at the time that it is made.

The Seventh Circuit's observation that the Pathologists had detrimentally relied on the payments represented, at most, an alternative basis for upholding the district court judgment. Under equitable principles which the court found controlling, *id.* at 6a, restitution must be denied if either: (1) the payer did not make a mistake of fact, *or* (2) the payee relies to its detriment on the payments. See *id.* at 8a (citing *City of Hope Nat'l Medical Ctr.* v. *Superior Court*, 10 Cal. Rptr. 2d 465 (Cal. Ct. App. 1992)).[5] Here, the court of appeals found that each of

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[5] *City of Hope* stated the principle as follows: "[W]hen a payment is made based upon a mistake of fact, the payor is entitled to restitution unless the payee has, in reliance on the payment, materially changed its position." 10 Cal. Rptr. 2d at 467. Judge Bucklo quoted this passage in her opinion below. Pet. App. 16a.

these conditions were present. But even if the court's conclusions with respect to detrimental reliance were incorrect—which they were not—the court's finding that Central States did not make a mistake of fact provides a fully sufficient basis for upholding the district court's judgment.

b. The decision below does not conflict with the decisions of any other court of appeals. Whether a course of conduct may estop an ERISA plan from denying coverage may well be an issue that has been "vexing the federal court system for some time," as Central States asserts. Petition at 10. It is not, however, an issue that has ever been presented in this case. Indeed, none of the cases Central States cites as evidence of a conflict among the circuits was cited in the court of appeals decision or in Central States' brief to the court of appeals. See *id.* at 14.

The cases cited by Central States stand for nothing more than the unobjectionable proposition that "courts must give effect to the unambiguous terms of an ERISA plan." *Lake* v. *Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1379 (6th Cir. 1996); see Petition at 14 (citing *Cinelli* v. *Security Pac. Corp.*, 61 F.3d 1437, 1444 (9th Cir. 1995); *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *Averhart* v. *US West Management Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994); *Slice* v. *Sons of Norway*, 34 F.3d 630, 634 (8th Cir. 1994); *Glass* v. *United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994); *Singer* v. *Black & Decker Corp.*, 964 F.2d 1449, 1453-54 (4th Cir. 1992); *Bellino* v. *Schulmberger Technologies, Inc.*, 944 F.2d 26, 32 (1st Cir. 1991)). Pathology Laboratories does not take issue with this proposition. Neither did the court of appeals hold, *sua sponte*, that courts may "modify" plan language in light of a course of conduct. Quite to the contrary, the court of appeals upheld the primacy of plan language by basing

its decision on the terms of Article 11.04—the only plan provision that was material to the issues on appeal.

Central States' policy arguments for not permitting plan modifications through estoppel are therefore beside the point. The court of appeals did not modify the Central States plan. It simply interpreted the plan. Its interpretation was well-founded and firmly based in the evidence of record and the language of the Plan Document. Accordingly, its decision does not conflict with the decision of any other court of appeals.

c. Neither can Central States identify any conflict between the decision below and the decisions of this Court. Central States cites *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 82 (1982) (quoting *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)), for the proposition that " 'rules of estoppel will not be permitted to thwart the purposes of statutes of the United States.' " As noted above, however, this case did not involve estoppel.

At its core, this case involves the application of well-established equitable principles of restitution to a run-of-the-mill payment dispute between a health plan and a medical provider. While the outcome is of intense interest to the parties involved, it involves no issues of national importance. See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). The findings of the courts below were amply supported in the evidence, specific to this case, and lacking in general public importance. They do not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 92 C 4241

CENTRAL STATES, *et al.*

v.

PATHOLOGY LAB OF ARKANSAS

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs' claim for reimbursement of payments made to the defendant from 1986 through 1991 is denied. Plaintiffs' motion for summary judgment on the issue of injunction is denied. Defendant's motion for summary judgment on that issue is granted. Accordingly, judgment is entered in favor of the defendant and against the plaintiffs.

Date April 17, 1995

H. STUART CUNNINGHAM
Clerk

/s/ [Illegible]
(By) Deputy Clerk